NO. 82-1134

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, et al.,
Petitioners

versus

GEORGE WILLIAMS, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Questions Presented For Review

1. Whether the Court below improperly by passed the "clearly erroneous" rule and this Court's decision in *Pullman-Standard v. Swint,* — U.S. —, 102 S.Ct. 1791 (1982) by mislabeling a factual finding as a statement of law and by mischaracterizing the issue presented.

2. Whether a determination that longshoremen in the Port of New Orleans constituted a single, common employment pool working interchangeably on various kinds of cargo, including grain, and that black longshoremen received their full share of longshore work and longshore earnings, notwithstanding the fact that they received a lesser share of grain work viewed in isolation, represented a factual finding subject to the "clearly erroneous" rule.

3. Whether the Court below improperly made its own factual findings, contrary to those of the District Court, in refusing to remand for further findings on the relationship between longshore work on grain cargoes and longshore work on other cargoes, and the impact of that relationship upon longshore employment patterns in the Port of New Orleans.

Parties to the Proceedings below

New Orleans Steamship Association
Atlantic and Gulf Stevedores, Inc.
Cooper Stevedoring of Louisiana, Inc.
Dixie Stevedores, Inc.
J.P. Florio and Co., Inc.
Gulf Stevedore Corporation
Louisiana Stevedores, Inc.
Lykes Bros. Steamship Co., Inc.
Mid-Gulf Stevedores, Inc.
New orleans Stevedoring Company
Rogers Termination and Shipping Corporation
Ryan-Walsh Stevedoring Company, Inc.
T. Smith & Son, Inc.

Southern Stevedoring Company
Strachan Shipping Company
United States Stevedore Corporation
J. Young & Company, Inc.
George James Williams
Duralph S. Hayes
Ernest W. Turner, Jr.
Mathew D. Richard
John T. Aaron
The International Longshoremen's Association (I.L.A.)
General Longshore Workers, Local Union No. 3000, I.L.A.,
Sacksewers, Sweepers, Waterboys and Coopers Union, Local Union No. 1685-1802, I.L.A.

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Petitioners, International Longshoremen's Association, Local 3000, ILA, and Local 1683-1802, ILA, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals entered herein on April 9, 1982 and October 8, 1982.

REPORT OF THE OPINIONS BELOW

The opinion of the District Court is reported at 466 F.Supp. 662 (E.D. La. 1979) and is reproduced in Appendix A.

The supplemental opinion of the District Court denying plaintiff's motion for reconsideration is unreported and is reproduced as Appendix B. The opinion of the Court of Appeals for the Fifth Circuit is reported at 673 F.2d 742 (5th Cir. 1982) and is reproduced in Appendix E. The opinion of the Court of Appeals for the

Fifth Circuit on the petition for rehearing is reported at 688 F.2d 412 (5th Cir. 1982) and is reproduced in Appendix F.

JURISDICTION

The Court of Appeals for the Fifth Circuit rendered and entered its order, reversing the judgment of the District Court, on April 9, 1982. Petitioners' application for a rehearing with suggestion of rehearing *en banc* was denied, in a separate opinion, on October 8, 1982.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

1. **Title VII of the Civil Rights Act of 1964,** 42 U.S.C. §2000 *et seq.*, in relevant part: See Appendix G.

2. 42 U.S.C. § 1981: See Appendix H.
3. Rule 52(a), Federal Rules of Civil Procedure: See Appendix I.

STATEMENT OF CASE

(1) Preliminary Statement

Plaintiffs instituted this action under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 as a broad-gauged attack on employment practices in the longshore industry in the Port of New Orleans, Louisiana. They contended that, although blacks constituted approximately 75% of the work force, black longshoremen did not receive their proportionate share of

either hours of employment or earnings.[1] In addition, they claimed that blacks received disproportionate shares of various kinds of work including LASH, carpentry, waterboy, and grain, and disproportionate numbers of jobs in specified classifications, such as deckmen, foremen, superintendents, etc. During the course of discovery, and again in the pre-trial order, plaintiffs whittled down their claims so that differing combinations of charges were levied against some, but not all, of New Orleans' longshore employers, all of whom hire from a single common labor pool. Despite the selective narrowing of claims, the case went to trial on a blunder-buss assortment of diverse claims, but without any consistency among the various defendants.

Contrary to statements in the two opinions of the Court of Appeals (Appendices E & F), the trial Court did not restrict or confine plaintiffs' trial presentation in any way. The District Judge made no pre-trial or trial rulings that prevented plaintiffs from attempting to prove any or all of their surviving claims, either separately or in combination.

The principal thrust of plaintiffs' trial presentation was directed at the entirety of longshore employment in its broadest sense. Plaintiffs sought to develop statistical evidence showing disproportionate use of blacks in longshore employment, compared to their numbers in the registered longshore work pool.[2]

In addition, but as a subsidiary aspect of this case, plaintiffs introduced some evidence bearing on the

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[1] Before trial and in the early stages of the trial, plaintiffs urged that the proportion of blacks in the work force exceeded 80%. The trial evidence quickly showed this figure to be inflated; and, thereafter, plaintiffs accepted the 75%-25% ratio which defendants had urged throughout.

[2] This case never presented an issue of entry discrimination. Plaintiffs accepted the numbers of blacks and whites in the registered pool as the appropriate starting point and then asserted that blacks were hired, in this largely casual industry, less than their numbers warranted. In the longshore industry, unlike most others, employees do not have steady, permanent jobs; rather they are hired anew on a daily basis depending on the vicissitudes of industry need, which itself depends on the number and type of vessels in Port at any particular time.

LASH, carpentry, grain and waterboy work, as well as on the supervisory and non-supervisory classifications in which blacks wre allegedly underrepresented. Finally, individual claims of the named plaintiffs and intervenors were litigated.

After the conclusion of trial, plaintiffs' counsel apparently realized that they had failed to establish their principal claim. For in their proposed findings, conclusions and post-trial brief, submitted many months later, they abandoned their claim of over-all discrimination and "re-focused"[3] their case on various specific kinds of work and job classifications. Despite defendants' repeated attempts to make clear to the Court of Appeals that this represented plaintiffs' own post-trial tactical decision, that Court persited, throughout two opinions, in attributing the state of the record to confining rulings of the trial Judge. Since no such rulings ever existed, the Court of Appeals' opinions provide no record reference that might elucidate the source of that Court's misconception.

The District Court, in a lengthy decision, found for defendants in all respects, except with respect to the maintenance of a dual union structure, an issue resolved without appeal by merger of local unions. (Appendix A). After the District Court's initial decision, plaintiffs moved for a rehearing on the subject of grain work alone; and after reconsideration, the District Court denied the motion in an opinion which reviewed in greater detail the evidence on grain work and the findings on which the Court predicated its decision. (Appendix B).

(2) The Unitary Nature of Longshore Employment in New Orleans

The nature of the longshore industry in New Orleans was not seriously disputed at trial, since plain-

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[3] The term "re-focused" was the one used by plaintiffs in explaining their post-trial abandonment of the basic theory and claim urged throughout pre-trial proceedings and at trial.

tiffs were then seeking to prove over-all discrimination in the industry considered as a whole, rather than on a lone, segmented type of cargo.

The New Orleans longshore industry consists of a single, multi-employer bargaining unit, including many companies which were never sued in this action as well as those dismissed before trial. All hire from a common labor pool, out of a common hiring center operated by the New Orleans Steamship Association, under the same collective bargaining agreement. Longshoremen may work for one employer on Monday, another on Tuesday, and a third on Wednesday. They work interchangeably with different kinds of cargo on different types of vessels. A longshoreman may work on break-bulk general cargo one day, grain another day, and LASH vessels the next. Or he may work on more than one kind of cargo on a single day. The District Court expressly found that "no longshoreman works exclusively at one type of work." (Appendices A & B).

(3) Grain Work

During the period at issue, grain operations constituted less than 10% of total longshore work. Earnings attributable to grain operations also constituted less than 10% of aggregate longshore earnings.

As indicated above, the same longshoremen who performed grain work also did general cargo work and participated in the totality of operations undertaken by the longshore industry in the Port of New Orleans. The grain gang consisted of eight members, who also formed part of a sixteen-man general cargo gang. The record is devoid of evidence that any longshoremen worked exclusively on grain. Although there is no record evidence on the amount of grain work performed by any individual or group of longshoremen, or the total number of longshoremen who performed some work on grain cargo, it is fair to assume that members of regular grain gangs did more grain work than

others, to some indeterminate extent. But plaintiffs have not complained that black members of regular grain gangs were discriminated against in the assignment of grain work.

Nor is there evidence that any longshoremen devoted themselves exclusively, or predominantly, to seeking fill-in work on grain gangs. The vast majority of all longshoremen, white and black, who were not members of regular grain gangs, sought and obtained employment on whatever cargoes or vessels were available, either as members of regular longshore gangs, non-regular gangs, or casual fill-ins.

In the mid-1950's, grain gangs consisted of about 40 men. With the advent of technological change both in the vessel itself and the modes of handling grain, the size of the grain gang decreased dramatically to the present eight.

The record does not disclose the racial composition of the grain gangs before their diminution in size or the seniority by race of the members of regular grain gangs at that time. In the mid-1950's, as the introduction of new technology was bringing about the dramatic change in gang size, the predominantly black Local 1419 insisted upon the insertion in the longshore collective bargaining agreement of a provision dividing grain gangs 50-50 between its membership and that of predominantly white Local 1418.

At that time, years before the enactment of the Civil Rights Act, the grain foremen were largely white and Local 1419 was concerned about retaining the blacks' fair share of the substantially diminishing grain work. Accordingly, the 50-50 allocation was inserted at the insistence of the blacks. There is no evidence that this allocation failed to reflect the then racial composition of the grain gangs or the results that would have followed if the reductions in force were based on the seniority of the grain gang members.

By the mid-1970's, the racial composition of the grain foremen group had substantially changed, with blacks forming a significant proportion. Accordingly,

Local 1419 no longer felt the need for the contractual assurance of 50% of this work, and the contractual provision was thereupon deleted. In early 1980, the local unions themselves were merged in compliance with the judgment of the District Court.

The Court of Appeals relied heavily on the small premium payable for grain work. This premium is but one of the many premium rates paid longshoremen for work at prescribed times, on specified days, or on special cargoes: i.e. weekends, nighttime, meal time, obnoxious cargo and damaged cargo. The grain premium is lower than most others.

(4) The District Court Decisions

The District Court's findings are contained in its two decisions: the principal decision on the merits and the decision denying reconsideration on the grain issue. In its principal decision, the Court made detailed findings on the unitary nature of the employment pool, the use of a single hiring center by all companies to fill their daily employment needs, and the hiring procedure by which longshoremen are selected out of the common pool to fill whatever work the multi-employer group might have available that day.

The Court then focused on the distribution of both jobs and earnings by race. Analyzing the extensive statistical evidence in the record, the Court found that blacks in the labor pool received almost exactly the proportion of employment hours and dollar earnings as their numbers bore the the entire pool. If anything, they fared slightly better. (Appendix A).

In its supplemented decision, the trial Judge dealt more extensively with the grain claim presented by plaintiffs. Building on the findings of industry employment practices already made, the Court found that grain premium rates were one of many kinds of premiums embodied in the governing collective agreement. With direct reference to the interchangeability of work assignment among all kinds of cargo for all

longshoremen in the common labor pool, the Court stated:

> "Plaintiffs were unable to show that the overall work allocation in the longshore industry was disproportionate or inequitable and we think that such a showing is crucial to prove racial discrimination. No longshoreman works exclusively at one type of work. Since he may work various types of cargo at different hours in any given week, the important thing is how he fares overall . . . There is no indication that the grain clause and the 20 cent differential created an overall discriminatory effect on the amount of money earned by black longshoremen." (Appendix B).

In short, to the extent that blacks received a somewhat lesser proportion of work on a single type of cargo comprising less than 10% of the whole, to that extent they were somewhat more available for non-grain work; they, in fact, received a disproportionately higher share of the non-grain work; and their over-all share of jobs and earnings slightly exceeded their proportion of the work force.

(5) The Court of Appeals Decisions

Although purporting to respect the District Court's findings, the Fifth Circuit in effect ignored them. Citing *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977), the Court stated that "claims of discrimination in only one segment of an employer's work force are cognizable under Title VII and § 1981." (Appendix E). The Court of Appeals analogized this case to one challenging department-wide discrimination; its approach was epitomized by its assertions that "the tasks of grain workers differ from those performed by other longshoremen because of the nature of the cargo involved" and "the distinctiveness of grain work makes plaintiffs' claim of discrimination in this one area viable . . ." This "distinc-

tiveness," in the Court's view, was evidenced by the premium rate and the contractual mode of allocation. (Appendix E).

In a motion for rehearing, defendants pointed out that the Court of Appeals' decision rested on an erroneous factual predicate: that grain work was a separate, distinctive type of job performed by different individuals as was, for example, the case in *Teamsters*. Defendants also urged that issues of separateness, distinctiveness or interchangeability were essentially factual, that the Court of Appeals had ignored the findings of the District Court in this regard, and that its decision thus ran counter to the later decisions of this Court in *Swint* and its progeny. Finally, defendants contended that if the Court of Appeals deemed the District Court's findings to be inadequate, then the appropriate course was to remand for additional findings.

The Court of Appeals then issued a supplemental opinion addressed specifically to the petitions for rehearing. Retreating from its reliance on *Teamsters*, the Court nevertheless adhered to its underlying factual premise that grain work was a separate job category. It also maintained that *Swint* was not implicated in its decision, although it conceded that "whether a job category constituted an entity with distinct and separate characteristics is a question of fact." Arguing that the District Court had not found "that grain work was factually indistinguishable from other jobs" and ignoring the District Court's findings that no longshoremen work on grain alone but rather on all types of cargo, as part of the single, common labor pool, the Court of Appeals persisted in its view of "the unique aspects of grain work." Its position was summed up in the statement that:

> "If the problem, however, is approached from the standpoint of the job rather than those who fill it, the distinctive nature of grain work is readily apparent." (Appendix F).

The Court declined to order remand on the issue of distinctiveness as against interchangeability on the ground that "there was only one possible resolution of the issue." (Appendix F).

The entire supplemental opinion was premised on the notion of a trial court ruling "that the issue of discrimination in grain work was not separately cognizable," which forced a change in the nature of plaintiffs' claim and compelled them to try a broader claim of industry-wide discrimination against their will. This, as stated above, is an inexplicable mischaracterization of what occurred, since any deficiencies in plaintiffs' proof on the grain issue were attributable not to the trial court, but to plaintiffs' own effort to prove a broader, all-encompassing case and their subsequent retreat to a segmented claim that received relatively little attention at trial.

REASONS FOR GRANTING THE WRIT

A.

This case presents an important issue in the implementation of this Court's decision in *Pullman-Standard v. Swint*, — U.S. —, 102 S.Ct. 1791 (1982). In *Swint* the Court admonished the Courts of Appeal that the "clearly erroneous" rule of Fed. R. Civ. Proc. 52(a) was not to be disregarded by misapplication of labels, specifically by mischaracterizing matters that are essentially factual in nature. In the present case, the same Court which was reversed in *Swint* has substituted its own view of the material factual components of the New Orleans longshore industry for that of the District Court. If *Swint* is to be so readily evaded, then the responsibility imposed upon District Courts in the resolution of factual questions will be eroded and the

force of the "clearly erroneous" rule nullified.[4]

Nor can *Swint* be circumvented by a misstatement of the issue, as the Court of Appeals has done in this case. The District Court properly found that the facts pertinent to this employment discrimination case are those bearing on employment patterns and practices. Thus, contrary to the Court of Appeals' assertion, the question of who fills which jobs is critical.

The Court of Appeals focused, instead, on "the job rather than those who fill it," and considered the "distinctiveness" of grain work from a functional standpoint. But functional characteristics are irrelevant except as they are reflected in employment patterns. The fact that various types of cargo—grain, hides, refrigerators, automobiles, explosives, foodstuffs, furniture, liquor, or containers containing assorted combinations of cargoes—may or may not involve different loading or discharging techniques, different types of mechanical equipment, or different degrees of difficulty, has no independent significance in a Title VII case alleging employment discrimination.

The principal fact relied upon by the Court of Appeals to demonstrate "distinctiveness" is the payment of a relatively modest premium rate for grain work. But many other cargoes, also performed on an interchangeable basis by longshoremen of both races comprising the common labor pool, require premium rates. So, too, does work performed at specified times of the day, or specified days of the week. The existence of a premium rate for grain no more establishes grain work as a discrete, distinctve job category of "grain workers" than does the existence of a meal hour premium rate establish a separate, segmentable class of "meal hours workers." This, moreover, is clearly a factual question.

In short, the Court of Appeals circumvented *Swint* by trivializing the critical facts which are, indeed, cen-

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[4] This Court has already remanded several cases to the Fifth Circuit for reconsideration in light of *Swint*. *Local Union No. 84, IBEW v. United States*, 72 L. Ed. 2d 477-478 (1982); *Machinists v. Terrell*, 72 L. Ed 2d 479 (1982); *White-Wilson Medican Clinic v. Robbins*, 72 L. Ed 2d 842 (1982).

tral to the resolution of plaintiffs' grain claim, while in effect finding other facts which it then deemed determinative. The relevant facts which the District Court found, on ample evidence, against plaintiffs, relate to the central issue of how the registered longshore work force is utilized; whether grain work—or, for that matter, work on any particular kind of cargo—is performed by a separate, identifiable class of employees; and, if not, how black longshoremen fared in the allocation of jobs and earnings within that industry which was serviced by the common labor pool. For, if blacks suffered no discrimination in the overall job (i.e. employment in longshore work for the multi-employer group) performed by the predominantly black common labor pool, the fact that they were underrepresented in work on a single type of cargo is irrelevant. The District Court made appropriate, and supported, findings on these matters; and under *Swint*, that should have been dispositive.

B.

If, however, the Court of Appeals believed that the District Court had entered inadequate findings on the "distinctiveness" or lack of "distinctiveness" of grain work—not in terms of the physical definition or functional characteristics of the task of grain handling aboard ship, but as it related to employment patterns and practices—then, under *Swint* the only appropriate course was to remand for further findings. This, moreover, is the course mandated by *Swint* either when the legal issue is correctly stated by the District Court or when the inadequacy of the District Court findings results from an erroneous view of the law. 102 S.Ct. at 1792.

The mere payment of a premium rate does not of itself establish grain work as a separate, distinctive segment of the New Orleans employment picture. It may bear on whether grain work is onerous, burdensome, or unpleasant, but that itself has nothing to do

with employment discrimination. Nor does the pre-1974 contractual grain clause obviate the need for remand, if the District Court's original findings were deemed inadequate; for that clause, too, must be placed in the context of the hiring and employment practices applicable to New Orleans' longshore labor force. Any underrepresentation of blacks in this small portion of the overall work available to the common labor pool meant greater availability of blacks for non-grain work. The evidence and the District Court findings, show that this greater availability was translated into greater utilization and disproportionately high non-grain earnings for blacks. If more detailed findings on this score were desired, that fell within the province of the District Court. A respect for the command of *Swint* and its progeny does not permit essentially factual matters to be the subject of new findings fashioned by the Court of Appeals through its own notions of how employment operated in the longshore industry of New Orleans.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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